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Nos. 83-321 & 83-322

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GUY WALLER,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

CLARENCE COLE, *et al.*,

Petitioners,

v.

STATE OF GEORGIA,

Respondent.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1.

Did the trial court properly order the courtroom to be closed during the hearing on the motion to suppress based upon provisions of the Georgia statutes on electronic surveillance?

2.

Did the Supreme Court of Georgia properly conclude that O.C.G.A. § 16-14-7(f) is constitutional on its face?

3.

Did the Supreme Court of Georgia properly conclude that there was no requirement that all material seized in the search in question be suppressed?

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BRIEF FOR RESPONDENT

Pursuant to Rule 34 of the Rules of this Court, the Respondent in Nos. 83-321 and 83-322 respectfully submits this joint brief.

OPINION BELOW

The opinion of the Supreme Court of Georgia is reported at 251 Ga. 124, 303 S.E.2d 437 and appears as Appendix A of the joint appendix.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. § 1257(3). The judgment of the Supreme Court of Georgia was entered on June 1, 1983. Petitioners filed timely petitions for writs of certiorari which were granted on November 7, 1983.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First, Fourth, Sixth and Fourteenth Amendments to the Constitution of the United States which are set forth in the joint appendix. This case also involves O.C.G.A. §§ 16-11-64(b)(8) and 16-14-7(a) and (f) which are set out in the joint appendix.

STATEMENT OF THE CASE

On February 9, 1982, the grand jury of Fulton County indicted the Petitioners in the two instant cases as well as numerous others on charges of violation of the Georgia Racketeer Influenced and Corrupt Organizations Act. All of the defendants entered pleas of not guilty to the charges.

On June 21, 1982, a trial commenced on the charges against the Petitioners and other defendants. At the conclusion of that trial, the Petitioners in the instant cases were found guilty of commercial gambling and communicating gambling information. Petitioner Eula Burke was sentenced to five years probation, and a $10,000 fine on one charge with a twelve month probated sentence on another charge. (R. 201, 209-210). Petitioner W. B. Burke was sentenced to five years with two years to serve and a $15,000 fine with a twelve month probated sentence being imposed on a separate charge. Petitioner Clarence

Cole was sentenced to five years with three years to serve and also received a twelve month probated sentence on a separate charge. Petitioner Thompson was sentenced to five years with two years to serve and a $10,000 fine, as well as a twelve month probated sentence on a separate charge. Petitioner Waller was sentenced to five years with three years to serve and the balance on probation and a $20,000 fine with a twelve month probated sentence being imposed on a separate charge. (R. 200, 207-8).

The facts of the case as presented at trial show that between June, 1981 and January, 1982, the Petitioners and others participated in a gambling organization which conducted a lottery based on the daily stock and bond volume on the New York Stock Exchange. This lottery was conducted in the metropolitan Atlanta area. Gambling information was transmitted by electronic means and stored in a microcomputer maintained by Petitioner Clarence Cole.

Prior to trial Petitioners filed a motion to suppress evidence based on searches that were conducted prior to the indictments. On June 14, 1982, the state filed a motion to close the hearings on the motion to suppress. The state asserted that the hearing was going to involve evidence of a sensitive nature and that the litigation on the motion would of necessity involve the introduction of evidence which would affect individuals not on trial at that time and individuals not indicted at that time. A portion of the information which would be disclosed involved certain evidence obtained through the use of electronic surveillance. The state sought to close the hearing based on the prohibition on publication of wiretap evidence set forth in O.C.G.A. § 16-11-64(b)(8). In order to allow the

state to utilize the same information in subsequent prosecutions against other individuals and to protect the privacy rights of those not on trial, the state sought to close the motion hearings. The trial court concluded that if the evidence was going to be offered at the trial of other offenders, the presentation of the evidence at the hearing on the motion to suppress in the instant cases would amount to publication and would taint the evidence under the Georgia statute. (S.T. 6-8).

When the requests were made, Attorney Charles Smith, counsel for Petitioner Clarence Cole and other defendants, agreed with the observation made by the state and concurred with the request, insofar as the request extended only to the hearings on the motion to suppress.[1] Attorney Herbert Shafer, representing the remainder of the defendants at that time, opposed the closure motion and asserted that he would insist on the right to an open trial. (S.T. 11).

The trial court granted the motion to close the proceedings only as to the hearing on the motion to suppress. Attorney Shafer sought to have certain individuals remain in the courtroom, but the trial court ruled that the statute was very specific, "[a]nd I think that means everybody must go except the defendants, counsel, necessary witnesses of course who appear, and the officers of the court." (S.T. 14). Attorney Smith interposed an objection to Attorney Shafer's wife remaining in the courtroom, although the state did not oppose such request. The trial court then granted the motion to close the proceedings and excluded all individuals except those previously enumerated by the court.

[1] Respondent would urge that Petitioner Cole is precluded from asserting the issue challenging the closure of this hearing as his counsel did concur with the closure motion at the time it was made.

After the trial and convictions, the Petitioners filed a direct appeal to the Supreme Court of Georgia raising numerous allegations. In particular, the Petitioners challenged the closure of the courtroom and the constitutionality of O.C.G.A. § 16-14-7(f). That court affirmed the convictions and sentences, in particular, concluding that the code section being challenged was constitutional on its face and did not violate the Fourth Amendment. The court also concluded that there was no requirement that the evidence that had been lawfully seized be suppressed. The court concluded that the Sixth Amendment right to a public trial was not violated by the closure of the courtroom, noting that the trial court exercised its inherent power to preserve order in the courtroom, to protect the rights of parties and witnesses and to further the administration of justice. *Waller v. State*, 251 Ga. 124, 303 S.E.2d 437, 441 (1983). The motion for rehearing was denied by that court on June 18, 1983. Petitioner then filed two separate petitions for writs of certiorari in this Court requesting that this Court review the decision by the Supreme Court of Georgia. On November 7, 1983, this Court granted the petitions for writs of certiorari and consolidated the two cases.

SUMMARY OF THE ARGUMENT

Under the facts of the instant case, the trial court's closure of the courtroom during the hearing on the motion to suppress did not violate Petitioners' right to a public trial. The closure was limited solely to the motion to suppress hearing which is a pretrial proceeding and not a part of the actual trial itself and specifically did not apply the ruling to the jury trial portion of the proceedings. The state had compelling interests, which were justifiable under the circumstances, in having the courtroom closed based on the statutory requirement that evidence obtained as a result of electronic surveillance not be subject to publication. In order to allow the state to seek subsequent prosecutions or indictments, it was necessary to close the courtroom to prevent a possible publication of such material. Such closure also served to protect the privacy rights of those individuals not then on trial or not under indictment at the time of the hearing. The trial court was within its authority to preserve order and decorum in the courtroom and to protect the rights of the parties involved in the case. Thus, the right of the Petitioners to a public trial was properly balanced against the state's overriding concerns regarding the wiretap evidence. Furthermore, closure was properly limited so that only the motion to suppress hearing was closed. Therefore, the instant closure did not constitute a violation of the right to a public trial.

The provisions of O.C.G.A. § 16-14-7(f) do not violate the Fourth Amendment to the United States Constitution. The statutory provision provides for forfeiture under certain circumstances. The statute provides for restrictions which brings the statute within the parameters of the Fourth Amendment by requiring that the seizure be

made pursuant to a lawful arrest, search or inspection and also by requiring that the law enforcement officer have probable cause to believe that the property in question is subject to forfeiture. Thus, by definition the statute complies with the Fourth Amendment.

There was no requirement that the evidence not suppressed be excluded at the time of trial. The search in question was not a general search as suggested by the Petitioners, but was made pursuant to valid statutory procedures and a valid warrant. The mere fact that officers may have seized evidence which was subsequently returned to the Petitioners does not render the entire search and all evidence seized pursuant to that search inadmissible and subject to the exclusionary rule. No such wholesale application of the exclusionary rule should be made in instances in which officers act pursuant to valid warrants.

ARGUMENT

I. THE TRIAL COURT PROPERLY CLOSED THE COURTROOM DURING THE HEARING ON THE MOTION TO SUPPRESS PRIOR TO TRIAL.

The first issue presented for review by this Court is a challenge by the Petitioners to the trial court's closure of the courtroom during the hearing on the motion to suppress. Petitioners have asserted that the closure by the trial court violated their right to a public trial under the Sixth Amendment to the United States Constitution.

At the beginning of the hearing on the motion to suppress, the state reasserted the former motion previously made for closure, stating that it would be necessary during the hearing on the motion to utilize evidence which

could involve a reasonable expectation of privacy on the part of persons who were not presently on trial. The motion was specifically made based on the provisions of O.C.G.A. § 16-11-64(b)(8) concerning publication of wiretap information and subsequent use of that information in other prosecutions. That code section specifically provides the following:

> Any publication of the information or evidence obtained under a warrant issued hereunder other than that necessary and essential to the preparation of and actual prosecution for the crime specified in the warrant shall be an unlawful invasion of privacy under this part and shall cause such evidence and information to be inadmissible in any criminal prosecution.

Id. The state asserted that the evidence to be presented could affect persons other than the defendants on trial and could involve some persons who had not even been indicted. The trial court concluded that the presentation of such evidence would amount to publication under the statute.

Attorney Smith, representing Petitioner Clarence Cole concurred with the request insofar as it extended to the motion to suppress. Attorney Shafer opposed the motion, particularly stating that he felt that there had already been unnecessary publication of the material. The court concluded that the actual trial of the case would present a different set of circumstances, but as the request was only to the motion hearing, it would be granted. Attorney Shafer requested that other persons be allowed to remain in the courtroom to assist him, to which Attorney Smith interposed an objection. The court ruled that the courtroom would be closed during the hearing on the motion to suppress so as to exclude all others except witnesses,

necessary court personnel, the parties and their lawyers. (S.T. 12).

The testimony at the hearing on the motion to suppress focused on the electronic surveillance that was conducted. Various persons testified concerning the obtaining of the warrants to conduct the electronic surveillance and various officers testified concerning the procedures that were utilized when monitoring telephone calls. Certain tapes of telephone calls that were obtained by way of wiretaps were played at the hearing on the motion to suppress.

On direct appeal, the Supreme Court of Georgia considered the allegations challenging the closing of the courtroom. The court concluded the following:

> In the hearing here, information was revealed which was potentially harmful to others, would tend to violate the privacy of others, and might prejudice other potential defendants. Under these circumstances, the court balanced [Petitioners'] rights to a public hearing on the motion against the privacy rights of others and closed the hearing. The court exercised its inherent power ". . . to preserve order and decorum in the courtroom, to protect the rights of parties and witnesses, and generally to further the administration of justice." *Lowe v. State*, 141 Ga. App. 433, 435, 233 S.E.2d 807 (1977). We find that [Petitioners'] Sixth Amendment right to a public trial was not violated. There is some question whether state or federal law would have required that the wiretap information be revealed only in a closed courtroom. OCGA § 16-11-64(b)(8) (Code Ann. § 26-3004); 18 U.S.C.A. § 2517. We need not reach this question since the thrust of [Petitioners'] argument is that the court failed to follow the procedure announced in *R. W. Page Corp. v. Lumpkin*, supra. This argument has no merit since the hearing in question occurred before

> that case was decided and before the procedural requirements set forth took effect.

Waller v. State, *supra*, 303 S.E.2d at 441.

The Sixth Amendment to the United States Constitution provides for an accused's right to a public trial. This right has been construed by numerous courts on many occasions. This Court has stated the following:

> Essentially, the public trial guarantee embodies a view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings (cite omitted). A fair trial is the objective, and "public trial" is an institutional safeguard for obtaining it.
>
> Thus, the right of "public trial" is not one belonging to the public, but one belonging to the accused, and inhering in the institutional process by which justice is administered. Obviously, the public-trial guarantee is not violated if an individual member of the public cannot gain admittance to a courtroom because there are not available seats. The guarantee will already have been met, for the "public" will be present in the form of those persons who did gain admission. Even the actual presence of the public is not guaranteed. A public trial implies only that the court must be open to those who wish to come, sit in the available seats, conduct themselves with decorum, and observe the trial process.

Estes v. Texas, 381 U.S. 532, 588-89 (1965) (Harlan, J., concurring).

It has been recognized by the courts that the Sixth Amendment reflects traditional distrust for secret trials and is an expression of the belief that the "knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on

possible abuse of judicial power." *In Re Oliver*, 333 U.S. 257, 270 (1948) (Footnote omitted).

The right to a public trial has been applied to various phases of the trial process itself. In *United States ex rel. Bennett v. Rundle*, 419 F.2d 599 (3d Cir. 1969), the court applied the right to a public trial to a *Jackson v. Denno* hearing, concluding that such a hearing was part of the trial and was held after the jury had been sequestered; therefore, the procedures fell within the constitutional guarantee to a public trial. The right to a public trial has been applied to contempt proceedings, even though they are considered to be summary in nature. *In Re Oliver, supra.* Recently, this Court has applied the right to a public trial to voir dire proceedings. *Press-Enterprise Co. v. Superior Court*, 34 Cr.L. 3019, decided January 18, 1984.

The Second Circuit Court of Appeals has applied the right to a public trial to a suppression hearing when the defendant and the public were excluded from the entire suppression hearing. *United States v. Clark*, 475 F.2d 240 (2d Cir. 1973). Chief Justice Burger, however, has noted, "[b]y definition, a hearing on a motion to suppress evidence is not a trial; it is a pretrial hearing." *Gannett Co. v. DePasquale*, 443 U.S. 368, 394 (1979) (Burger, C.J., concurring). In that same concurrence, Chief Justice Burger noted that at common law the courts recognized that the timing of a proceeding was likely to be critical. "To make public the evidence developed in a motion to suppress evidence, . . . would, so long as the exclusionary rule is not modified, introduce a new dimension to the problem of conducting fair trials." *Id.* at 395. Therefore, the fact that the closure in the instant case occurred at a hearing on a motion to suppress is at least a factor to be considered

in determining whether there has been a denial of the right to a public trial.

The right to a public trial has been held not to be limitless by various courts. *Lacaze v. United States*, 391 F.2d 516 (5th Cir. 1968). The Second Circuit Court of Appeals has recognized that the constitutional right to a public trial is subject to the court's power to preserve fairness and orderliness of the proceedings of the court. *United States ex rel. Bruno v. Herold*, 368 F.2d 187 (2d Cir. 1966). It has also been recognized that the right is not absolute and the trial court may in its discretion exclude the public for a part or all of the criminal proceedings where it is necessary to preserve order, protect witnesses or maintain confidentiality of certain information. *Boyd v. LeFevre*, 519 F.Supp. 629 (E.D.N.Y. 1981).

Recently this Court has examined the right to a public trial from a First Amendment perspective and held, "closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness." *Press-Enterprise Co., supra*, 34 Cr.L. at 3021. The Court also went on to note the following:

> We have previously noted that in some limited circumstances, closure may be warranted. Thus a trial judge may, "in the interest of the fair administration of justice, impose reasonable limitations on access to a trial."

Id. at 3022 n. 10, quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 n. 18.

The cases teach us that in order to make a complete evaluation of an allegation concerning the denial of a right to a public trial, it is first necessary to examine the underlying purposes for this right. The Sixth Amendment

public trial provision is derived from a common law policy in favor of public proceedings. An initial common law purpose for the public trial right was to curb a secret bias or partiality on the part of a judge. 3 W. Blackstone, *Commentaries* * 372. Later authorities noted that publicity would discourage witnesses from perjury and also might assist in developing persons who otherwise might not know that they possessed information relevant to the trial. 6 J. Wigmore, *Evidence in Trials at Common Law* § 1834 at 435 (Chadbourne Rev. 1976). *See also United States v. Cianfrani*, 573 F.2d 835, 848 (3d Cir. 1978).

This Court in *Gannett Co., supra*, specifically reviewed the interests protected by the public trial right:

> Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously, and generally give the public an opportunity to observe the judicial system.

Id. at 383. Other courts have noted that the right provides protection from secret proceedings, assists in the likelihood that more truthful testimony would result and serves to give notice to the world of details of the case. *Douglas v. Wainwright*, 521 F.Supp. 790, 795 (M.D. Fla. 1981). Therefore, there are strong societal interests in public trials; however, there are strong societal interests in other constitutional guarantees as well. *Gannett Co., supra* at 383.

In evaluating a particular case, it is essential to consider whether the procedure in question meets the purposes of the guarantee to the right to a public trial. "In particular the court must analyze, in light of those purposes of the public trial guarantee which the defendant

alleges were undermined . . . the scope and practical impact of the partial closure . . . and the strength of the reason for the closure." *Douglas v. Wainwright*, 714 F.2d 1532, 1540 (11th Cir. 1983). Thus, whether a particular proceeding is sufficiently "public" to meet constitutional standards, turns on the particular circumstances of the case. *Aaron v. Capps*, 507 F.2d 685, 687 (5th Cir. 1975). "[A]lthough the Constitutional right of public trial is a substantial one, the term 'public' is a relative one, and its construction depends upon various conditions and circumstances. . . ." *Douglas v. Wainwright, supra* at 1540 n. 5, quoting *United States v. Geise*, 158 F.Supp. 821, 824 (D. Alaska 1958). Thus, this Court must consider the circumstances in the instant case, including the purposes of the right to a public trial and the specific reasons for closure in the instant case.

Courts have recognized governmental interests in closure of proceedings under various circumstances. It has been recognized that states and the government have interests to protect as well as do individuals. In *United States ex rel. Bennett v. Rundle, supra*, the court recognized that the state was free to regulate the procedures of its courts in accordance with its own conception of policy and fairness. *Id.* at 613, citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). The Second Circuit Court of Appeals has recognized the government's interests in protecting a hijacker profile from disclosure. Thus, in *United States v. Bell*, 464 F.2d 667 (2d Cir. 1972), the court upheld the exclusion of the defendant and the public from a limited portion of a suppression hearing. The court found that the protection of the air traveling public was a sufficient justification for the limited exclusion of the public from that portion of the trial.

In *United States v. Hernandez*, 608 F.2d 741 (9th Cir. 1979), the government requested that spectators be excluded during the testimony of an informant. The request was based on concerns of danger to the witness and his family. The request was granted over the defendant's objection. The Ninth Circuit Court of Appeals concluded that the exclusionary order was appropriate under the circumstances, noting that the right to a public trial did not preclude a limited exclusion when there was a demonstrated need to protect a witness. The court also noted that the right to a public trial was subject to the trial court's power to keep order in the courtroom. The court expressed a concern that there be an accommodation of the individual's right to a public trial and the societal interest that might justify the closing of the courtroom to the public. *Id.* at 747.

Other courts have recognized the government's interest in protecting witnesses as sufficient to justify closure. In *Castillo v. Harris*, 491 F.Supp. 33 (S.D. N.Y. 1980), the courtroom was sealed during the testimony of an undercover police officer who was still actively engaged in undercover activities. Under those circumstances, the court found a sufficient justification presented on behalf of the state for the closure in question. In *Boyd v. LeFevre*, *supra*, the court recognized that the right to a public trial was not absolute and found that if necessary to preserve order, protect witnesses or maintain the confidentiality of certain information, closure might be justified.

The Eighth Circuit Court of Appeals held that privacy of others was also a concern which might justify closure under certain circumstances. The case involved wiretap and electronic surveillence evidence. The court concluded that the protection of privacy was an overriding con-

gressional concern under those circumstances. *In Re Application of Kansas City Star*, 666 F.2d 1168 (8th Cir. 1981).

Finally, this Court has addressed the public trial right in light of the First Amendment guarantees on numerous occasions. In *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539 (1976), the Court balanced the right of a trial by an impartial jury against public trial considerations. A similar analysis was conducted in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

A pertinent factor in the instant case is the type of evidence that was to be presented during the hearing on the motion to suppress. The state was concerned with evidence obtained as the result of electronic surveillance. This concern also has arisen in federal cases involving Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 *et. seq.* In *United States v. Cianfrani, supra*, the court was specifically concerned with the provisions of Title III concerning disclosure of information obtained through interceptions by way of electronic surveillance. The court noted that Title III was a statute designed to regulate the interception and disclosure of wire and oral communications. The Act has purposes of protecting the privacy of such communications and setting forth a uniform basis under which the interception of such communications could be authorized. *Id.* at 855. The legislative history of Title III makes it quite clear that "the protection of privacy was an overriding congressional concern" of the Act. *Gelbard v. United States*, 408 U.S. 41, 48 (1972).

Under Title III, there are strict provisions prohibiting the use of the contents of communications in trials or other proceedings if the disclosure would violate the Act.

In evaluating Title III in light of the circumstances of the case, the court in *United States v. Cianfrani* extensively examined the legislative history of the statute which "emphasizes the concern of its drafters that the Act preserve as much as could be preserved of the privacy of communications, consistent with the legitimate law enforcement need that the statute also sought to effectuate." *Id.* at 856. The court went on to note that Congress obviously intended to regulate strictly the disclosure of such communications, "limiting the public revelation of even interceptions obtained in accordance with the Act to certain narrowly defined circumstances." *Id.*

In examining the circumstances of that case, the Third Circuit Court of Appeals concluded that protection of the privacy of communications was vital to society.

> We depend upon the free interchange of ideas and information. And we are dedicated to the proposition that each individual should be free from unwarranted intrusion into his private affairs. Both these interests are threatened by modern techniques of electronic surveillance, however, since it is now possible to record surreptitiously the most intimate conversations and to preserve them for later disclosure. Only by governing strictly both authorization and disclosure of intercepted communications the Congress believe that such weighty interests could be protected adequately.
>
> We believe that the interest in protecting the privacy of communications is sufficiently weighty to justify some limitations in certain circumstances on the general right of access to court proceedings. And we believe that the circumstances of this case present the required strict and compelling necessity to justify a limitation on public access to the hearing held below. Only by allowing such limitations can we effectuate the congressional concerns evident in Title

III and preserve the strength of that statute's provisions governing disclosure.

United States v. Cianfrani, supra, 573 F.2d at 856-7. Thus, the court found a limited exception to the right of public access which the court concluded was required under the Act.

The Eighth Circuit Court of Appeals has also addressed the question of public access to wiretap and electronic surveillance information. That court noted that Title III had a dual purpose of "protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which interception of wire and oral communications may be authorized." *In Re Application of Kansas City Star, supra,* 666 F.2d at 1174. The court found that the government's investigation and the protection of privacy were overriding congressional concerns under Title III. The court then concluded that under the circumstances, the privacy of others should not be unduly invaded. *Id.* at 1175.

The Seventh Circuit Court of Appeals also considered wiretap information in *United States v. Dorfman,* 690 F.2d 1230 (7th Cir. 1982). The defendants were charged with various federal crimes and the government had been engaged in wideranging wiretaps. A motion to suppress was filed on behalf of the defendants and the district judge ordered that the exhibits be sealed. Various newspapers moved to have the exhibits unsealed. The judge sealed the exhibits to protect the defendants' right of privacy and the right to a fair trial. The court noted that the strict prohibition set forth against the disclosure of unlawfully obtained wiretap evidence would be undermined by disclosure of wiretap evidence at a suppression

hearing before the court ruled on its lawfulness. *Id.*

Thus, it can be seen that the courts have maintained consistently that while a defendant does have a right to a public trial, there may be certain circumstances under which the government's or state's interests may override the right to a public trial for limited purposes and for a limited period. Thus, the right of the state to protect the procedure of the courts, the confidentiality of informants, to protect witnesses and the privacy of others, have all been recognized by various courts as justification for at least partial closure. In particular, cases in which wiretap evidence is to be utilized have recognized a statutory obligation for closure under Title III.

In examining the circumstances in the instant case, Respondent asserts that the facts clearly justified the closure in question. The state had an interest in protecting the privacy of persons not on trial as well as protecting its ability to subsequently bring to trial those persons who had not been indicted or who were not presently on trial. Thus, the state was faced with the prohibitions of O.C.G.A. § 16-11-64(b)(8) on publication of wiretap information and the possibility that an open hearing on the motion to suppress could prevent future trials of individuals involved in the electronic surveillance. There was also the possibility of the unwarranted invasion of the privacy of others by the opening of the hearing on the motion to suppress. Clearly, the state statute has the same concerns as does the federal statute and as the concerns set forth in Title III of the Omnibus Crime Control and Safe Streets Act. An overriding concern is privacy of individuals not on trial and the unwarranted intrusion into that privacy by the unnecessary publication of electronic surveillance materials. Thus, the state

did have a justification for requesting the closure of the hearing on the motion to suppress.

The trial court had the obligation of balancing the privacy rights of others and the public trial right of the Petitioners in the instant case. As noted by the Supreme Court of Georgia, the trial court exercised its inherent power "to preserve order and decorum in the courtroom, to protect the rights of parties and witnesses, and generally to further the administration of justice." *Waller v. State*, *supra* at 441 quoting *Lowe v. State*, 141 Ga. App. 433, 235, 233 S.E.2d 807 (1977). As the state did have an overriding societal concern in mind when requesting the closure, Respondent urges this Court to conclude that Petitioners' public trial right was not violated by the closure in the instant case.

Furthermore, the closure in the instant case was not unduly extensive. Although the trial court did close the entire hearing on the motion to suppress, the court specifically did not close any portion of the actual trial itself. Witnesses were available and testified at the trial of the case who had previously testified at the hearing on the motion to suppress. Therefore, all these witnesses were subject to public scrutiny when they testified and the purpose of inhibiting perjury was met by this later testimony. This later testimony also met the purpose of the public trial guarantee of discovering those persons who might have information about the case.

Respondent asserts that as the stated purposes behind the guarantee to a public trial were met in the instant case and because the state had an overriding concern in requesting the closure and, finally, because the trial court properly balanced the various concerns, the Petitioners' right to a public trial was not violated by the closure of

the hearing on the motion to suppress. Therefore, this Court should affirm the judgment of the Supreme Court of Georgia as to this issue.

II. THE SUPREME COURT OF GEORGIA PROPERLY CONCLUDED THAT O.C.G.A. § 16-14-7(f) DOES NOT VIOLATE THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND PROPERLY CONCLUDED THAT THERE IS NO REQUIREMENT THAT ALL EVIDENCE SEIZED BE SUPPRESSED.

A. FACIAL VALIDITY OF THE STATUTE.

Petitions in the instant case have challenged the provisions of O.C.G.A. § 16-14-7(f) setting forth the forfeiture provisions under the Georgia Racketeer Influenced and Corrupt Organizations Act. In particular, the statute provides the following:

> Seizure may be effected by a law enforcement officer authorized to enforce the penal laws of this state prior to the filing of the complaint and without a writ of seizure if the seizure is incident to a lawful arrest, search, or inspection and the officer has probable cause to believe the property is subject to forfeiture and will be lost or destroyed if not seized. Within ten days of the date of seizure, the seizure shall be reported by the officer to the district attorney of the circuit in which the seizure is effected; and the district attorney shall, within a reasonable time after receiving notice of seizure, file a complaint for forfeiture. The complaint shall state, in addition to the information required in subsection (e) of this Code section, the date and place of seizure.

O.C.G.A. § 16-14-7(f). Petitioners challenged this code

section, asserting that it is facially invalid.[2]

Respondent asserts that the statute in question fully complies with the requirements of the Fourth Amendment and that the search in question was proper and conformed to the Fourth Amendment requirements. The Supreme Court of Georgia considered the challenge to the facial validity of the statute and held the following:

> A seizure under this section is allowed only in carefully prescribed circumstances. The seizure must be incident to a lawful arrest, search or inspection, and the officer must have probable cause to believe that the property is subject to forfeiture or that the property will be lost or destroyed if not seized. There is no Fourth Amendment problem with the seizure of the fruits of a lawful search or inspection. The statute on its face provides that the search or inspection must be lawful. This requires that the search be pursuant to a warrant, incident to a lawful arrest, or in the presence of other exigent circumstances, which would render the search or inspection "lawful." By definition, therefore, the statute complies with the Fourth Amendment.

Waller v. State, supra, 303 S.E.2d at 440. The court went on to note that "seizure of contraband evidence, or weapons not listed on a search warrant by an officer executing an arrest warrant or search warrant does not

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[2] In the initial petitions for writs of certiorari filed before this Court, it was asserted by the Petitioners that the statute was facially invalid because it delegated unbridled discretion to police officers executing a search. At no time in the initial petitions was a challenge made to the validity of the search warrants themselves, nor was a complaint made concerning the trial court's failure to rule on the validity of the search warrants. Apparently, Petitioners now seek to raise additional challenges concerning the trial court's refusal and also concerning the definition of "property subject to forfeiture" in the statute. Respondent asserts that these are not proper issues for this Court to consider as they were not raised in the initial petitions.

violate the due process clause of the Fourth Amendment even though there has been no notice and hearing." *Id.*

The statute in question provides four conditions precedent to the seizure of property for RICO proceedings. The first requirement set forth in the statute is that the seizure be made by a law enforcement officer authorized to enforce the laws of this State. This provision clearly comports with the requirements of the Fourth Amendment.

The second requirement set forth in this statute is that the seizure be made incident to a lawful arrest, search or inspection. The designation of the search or inspection as "lawful" clearly complies with the Fourth Amendment requirements. Thus, before any seizure could be made under this statute, the officer must be proceeding under a lawful search warrant, be conducting a search pursuant to a lawful arrest or conducting a search authorized by certain exigent circumstances recognized by this Court as justifying a warrantless search. *See Chimel v. California*, 395 U.S. 752 (1969); *Warden v. Hayden*, 387 U.S. 294 (1967); *Payton v. New York*, 445 U.S. 573 (1980).

The third requirement set forth by the statute is that the officer have probable cause to believe that the property being seized is subject to forfeiture as provided in O.C.G.A. § 16-14-7(a). The code section provides, "all property of every kind used or intended for use in the course of, derived from, or realized through a pattern of racketeering activity is subject to forfeiture to the State." *Id.* The provisions for forfeiture allow the seizure and forfeiture of all property, no matter how inoffensive, if said property was acquired with racketeering proceeds. The forfeitures are made because the personal property was realized through or derived from the crime in question. *See Western Business Systems, Inc. v. Slaton*, 492

F.Supp. 513 (N.D.Ga. 1980).

This third requirement, rather than giving officers unbridled discretion, merely is a codification of the plain view doctrine as endorsed by this Court as recently as the decision in *Texas v. Brown*, ____ U.S. ____, 103 S.Ct. 1535 (1983). In that case, this Court stated the following:

> As these cases indicate, "plain view" provides grounds for seizure of an item when an officer's access to an object has some prior justification under the Fourth Amendment (footnote omitted). "Plain view" is perhaps better understood, therefore, not as an independent "exception" to the warrant clause, but simply as an extension of whatever the prior justification for an officer's "access to an object" may be.

Id., 103 S.Ct. at 1540-41. Therefore, officers may observe an object while executing a search warrant, or, seize an item acting pursuant to some other exception to the warrant clause. *See, e.g., Warden v. Hayden, supra.* There are circumstances under which officers may need no justification under the Fourth Amendment for their access to the item, as when the property is left in a public place. *See Payton v. New York, supra.*

The same principles that apply in a normal plain view situation also would apply under the circumstances of a search and subsequent seizure for forfeiture under the RICO statute. The theory behind the plain view doctrine is that once an officer has observed an object in plain view, the remaining interests of the owner in the object are merely those of possession and ownership. *Texas v. Brown, supra*, 103 S.Ct. at 1541. The doctrine also "reflects the fact that requiring police to obtain a warrant once they have obtained a first-hand perception of contraband, stolen property or incriminating evidence generally would be a 'needless inconvenience' (cite omitted)

that might involve danger to the police and public." *Id.*, citing *Coolidge v. New Hampshire*, 403 U.S. 443, 468 (1971). Therefore, this Court has recognized that "in light of the private and governmental interests . . . our decisions have come to reflect the rule that if, while lawfully engaged in an activity in a particular place officers perceive a suspicious object, they may seize it immediately." *Texas v. Brown, supra*, 103 S.Ct. at 1541. This is merely an application of the requirement of reasonableness under the Fourth Amendment to the law governing seizures of property.

It can thus be seen that the third requirement of the statute on forfeiture is merely a codification of the plain view doctrine as set forth by this Court. Once the officers are in the position to be conducting a lawful search as outlined under the second requirement of this statute, the principles of "plain view" allow the officers to seize evidence that they come across during the course of their search for the specified items. The specification by the statute in question allowing the officers to determine if the property is subject to forfeiture is no different from a traditional plain view application in which the officers determine if an item is contraband or is incriminating in some evidentiary fashion. Therefore, this statute clearly does not exceed permissible Fourth Amendment parameters.

This Court has recognized that "the seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity." *Payton v. New York, supra*, 445 U.S. at 587. Items subject to forfeiture may be dealt with in a fashion similar to contraband, evidence or weapons under the circum-

stances previously described. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974). Such seizure, even without prior notice and a hearing, does not offend due process in certain specified circumstances, including the necessity to secure governmental or societal interests. *Id.* Therefore, an officer conducting an otherwise lawful search, as under a search warrant in the instant case, may seize contraband, evidence, weapons or items subject to forfeiture under the prescribed circumstances even though these items are not specifically listed in the search warrant.

The statute in question sets out a fourth requirement for the seizure of property. Under the fourth requirement the officer must also have probable cause to believe that the property will be lost or destroyed if not seized. This requirement is simply a codification of the "exigent circumstances" requirements recognized by this Court in numerous settings. This Court has recognized this principle in creating the automobile exception in *Carroll v. United States*, 267 U.S. 132 (1925), which was subsequently followed in *Chambers v. Maroney*, 399 U.S. 42 (1970). The exigent circumstances exception has also been recognized in "hot pursuit" situations as set forth in *Warden v. Hayden, supra*. The search incident to arrest exception has also been recognized by this Court in *Chimel v. California, supra* and *New York v. Belton*, 453 U.S. 454 (1981).

An examination of the statute as a whole and the requirements set forth in the statute show that, rather than granting unbridled discretion to police officers or being an overbroad provision for seizure, the statute merely codifies Fourth Amendment principles set forth by this Court in numerous cases. The four requirements all fall

within the parameters of the Fourth Amendment to the United States Constitution and the decisions previously set forth by this Court. The search in the instant case met the requirements of the statute as it was conducted pursuant to a lawful search warrant,[3] was made by officers authorized to enforce the penal laws of this state, the officers had probable cause to believe that the property in question would be subject to forfeiture and the officers had probable cause to believe that the property would be lost or destroyed if not seized as much of the evidence was in the nature of papers and documents readily destroyed. Therefore, Respondent submits that the statute in question is constitutional on its face and the search conducted pursuant to the warrant and under this statute was lawful.

B. THE NATURE OF THE SEARCH CONDUCTED.

In addition to the challenge to the statute itself, Petitioners have asserted that all evidence seized should have been suppressed as the search was in the form of a "general" search prohibited by the decisions of this court. Petitioners primarily rely upon this Court's decision in *Stanford v. Texas*, 379 U.S. 476 (1965) for this proposition. Respondent asserts that as the searches conducted were lawful and made pursuant to a valid search warrant, the mere fact that certain of the evidence was returned to the Petitioner does not render the entire search

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[3] Although Petitioners have asserted that this Court should remand for a consideration of the lawfulness of the search warrant, as noted previously, this issue was not raised in the petitions for writs of certiorari initially filed in this Court; therefore, Respondent urges this Court to not consider this issue at this time.

and seizure invalid.[4]

In *Stanford v. Texas, supra*, a warrant was issued under a particular Texas statute which the Court noted was "a sweeping and many-faceted law which, among other things, outlaws the Communist Party and creates various individual criminal offenses. . . ." *Id.* at 477. A warrant was obtained under this statute and four hours were spent gathering up over half of the books found in the house. Officers also took possession of private documents and papers, but did not find any records of the Communist Party or party lists and dues payments. *Id.* at 480. This Court concluded that the search was invalid "for we think it is clear that this warrant was of a kind which it was the purpose of the Fourth Amendment to forbid—a general warrant." *Id.* Thus, the decision focused on the nature of the warrant itself in addition to the nature of the search conducted.

The Court concluded that the requirement of particularity for a warrant was to be scrupulously adhered to when the things to be seized were books and the basis for the seizure was the ideas contained in the books. *Id.* at 485. As the Court noted, in that case no contraband of any kind was ordered to be seized, but merely literary material concerning the Communist Party. "The indiscriminate sweep of that language is constitutionally intolerable." *Id.* at 486. Thus, rather than this Court concluding that the nature of the search itself rendered the warrant a general warrant, the conclusion was reached that the warrant on its face authorized a general search. In the initial petitions for writs of certiorari, filed in this

[4] The state never specifically conceded at trial that any evidence was improperly seized, but merely noted that the evidence would not be utilised by the state and that the documents were not instrumentalities of crime *per se*. (S.T. 630).

Court, the Petitioners specifically stated, "The search warrant issued here was not a general warrant on its face. The things to be discovered were described with particularity." (Petitions for writs of certiorari at 14). Thus, the warrant itself is not called into question. The only issue presented is whether the fact that the officers seized items, allegedly outside the warrant, based on the forfeiture provisions of the RICO statute, would render the search and the warrant invalid.

The Eleventh Circuit Court of Appeals addressed somewhat similar concerns in *United States v. Wuagneux*, 683 F.2d 1343 (11th Cir. 1982). In that case, the court noted the following:

> At the same time, the Supreme Court has recognized that effective investigation of complex white-collar crimes may require the assembly of a "paper puzzle" from a large number of seemingly innocuous pieces of individual evidence: "The complexity of an illegal scheme may not be used as a shield to avoid detection when the State has demonstrated probable cause to believe that a crime has been committed and probable cause to believe that evidence of this crime is in the suspect's possession."

Id. at 1349, quoting *Andresen v. Maryland*, 427 U.S. 463, 481 n. 10 (1976). The Eleventh Circuit Court of Appeals went on to note that the magnitude of the search by itself would be insufficient to establish a constitutional violation. *Id.* at 1352. The relevant inquiry was whether the search and seizure in question was reasonable under the circumstances.

All circumstances of the search and seizure should be considered, not solely the scope of the search. *See United States v. Heldt*, 668 F.2d 1238, 1254 (D.C. Cir. 1981). In *United States v. Heldt*, the court recognized that a fla-

grant disregard for the limitations of the warrant could possibly transform the search into a general search. In that case the court noted that there were some items seized outside the warrant, but there was not such a flagrant disregard for the terms of the warrant which would justify the drastic remedy of total suppression. *Id.* at 1259. The court also noted that the plain view doctrine allowed the officers to go outside the literal words of the warrant. *Id.* at 1266. The Eleventh Circuit Court of Appeals also noted that absent a flagrant disregard for the terms of the warrant, seizure of items outside the scope of the warrant would not affect the admissibility of items properly seized. *United States v. Wuagneux*, *supra* at 1353.

As noted by the Supreme Court of Georgia, "there is no requirement that where evidence has been lawfully seized it must be suppressed if officers unlawfully seized other material, unless the unlawfully seized evidence led to discovery of the evidence which was admitted." *Waller v. State*, *supra*, 303 S.E.2d at 440. There simply is no question in the instant case of derivative evidence, therefore, this Court should not extend the exclusionary rule to suppress all evidence seized in the instant case.

A further concern in this case involves the type of crime in question as well as the type of seizure involved. The statute involved in this case is specifically a civil statute providing for civil forfeiture proceedings. The procedures under this statute are governed by the Georgia Civil Practice Act. Under this statute, all personal property realized through or derived from organized crime may be seized and subject to forfeiture. *Western Business Systems Inc. v. Slaton*, *supra*. This forfeiture provision arises under a specified statute designed for

the particular purpose of inhibiting organized crime. In enacting the RICO statute, the General Assembly of Georgia established the following:

> The General Assembly declares that the intent of this chapter is to impose sanctions against this subversion of the economy by organized criminal elements and provide compensation to private persons injured thereby. It is not the intent of the General Assembly that isolated incidents of misdemeanor conduct be prosecuted under this chapter but only an interrelated pattern of criminal activity, the motive or effect of which is to derive pecuniary gain. This chapter shall be construed to further that intent.

O.C.G.A. § 16-14-2(b). Under the federal RICO statute, a similar legislative intent can be found. "The legislative history clearly demonstrates that the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello v. United States*, ___ U.S. ___, 104 S.Ct. 296 (1983). This Court recognized in that decision that the forfeiture provisions of the federal RICO statute include all profits and proceeds of racketeering enterprises. *See* 18 U.S.C. § 1963(a)(i). The Georgia statute has a similar intent and purpose to the federal RICO statute. The Georgia General Assembly, like Congress, recognized the need to fashion new remedies in order to achieve the far-reaching objective of combatting organized crime.

Respondent submits that the search in question was conducted pursuant to a valid search warrant which was specifically not a general warrant on its face. The scope of the search itself should not be sufficient for this Court to take a drastic approach to the application of the exclusionary rule and exclude all evidence seized. The officers did not act in flagrant disregard of the provisions of

the warrant, but acted pursuant to the warrant and pursuant to the forfeiture provisions of the Georgia RICO statute. In light of the purposes intended to be served by both the Georgia and federal RICO statutes, Respondent would urge this Court to uphold the searches in question and conclude that there was no requirement that all evidence seized under said searches be suppressed at trial.

CONCLUSION

For all of the above and foregoing reasons, the convictions and sentences of the Petitioners should be affirmed and this Court should affirm the decision of the Supreme Court of Georgia.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mary Beth Westmoreland, a member of the Bar of the Supreme Court of the United States and Counsel of Record for the Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief for the Respondent upon the Petitioners by depositing copies of same in the United States mail with proper address and adequate postage to:

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